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9
10 **UNITED STATES DISTRICT COURT**
11
12 **NORTHERN DISTRICT OF CALIFORNIA**
13
14 **SAN FRANCISCO DIVISION**

15 **STEPHEN MITCHELL**

16 **CASE NO. C 07-5112 CW**

17 Plaintiff,

18 v.

19 DR. HAROLD NEMETZ, OPEN DOOR
20 COMMUNITY HEALTH CENTER, U.S.
21 DEPARTMENT OF HEALTH & HUMAN
22 SERVICES and DOES 1-20 inclusive

23 **OPPOSITION TO FEDERAL
24 DEFENDANT'S MOTION TO
25 DISMISS PLAINTIFF'S COMPLAINT**

26 Date: March 6, 2008

27 Time 2:00 PM

28 Location: Hon. Claudia Wilken
Courtroom 2 4th Floor
1301 Clay Street,
Oakland, CA 94612-5212

29 Defendants.

30 Pursuant to Local Rule 6-3(c), plaintiffs hereby oppose defendants' Motion
31 Motion to Dismiss.

32 The Motion seeks to dismiss the Complaint in this action with prejudice due to lack of
33 subject matter jurisdiction filed by Plaintiff Stephen Mitchell. This Motion should be denied
34 because defendants have failed to provide good cause in support of their request

35 1.

36 **Factual Background**

37 Plaintiff Mitchell maintains his home in Del Norte County, Northern California and was seen at
38 Open Door Community Health Center in Crescent City, Del Norte County, California. On or
39 about 10-18-02 during business hours on said date, Dr. Harold Nemetz, who is employed by the
40 Open Door Community Health Center, provided dental service for claimant who had previous

1 dental services provided by said facility on 09-05-01 where tooth #15 was extracted. On 10-18-
2 02 Dr. Nemetz diagnosed claimant's tooth #2 with a vertical fracture. A consent form was signed
3 to extract #2. Claimant, within a short period of time, was experiencing extensive pain in the
4 same area and confronted Dr. Nemetz as to whether or not he had extracted the wrong tooth. Dr.
5 Nemetz denied this allegation and continued to deny same even when being investigated by the
6 State Dental Board. Subsequent visits to two dental offices could not confirm that a wrong tooth
7 had been extracted due to lack of dental records. Both Dentists confirmed that the #2 tooth was
8 still in place and was vertically fractured.

9 **II.**

10 **Issue Before This Court**

11 Did the continuing fraudulent concealment by Defendant Dr. Harold Nemetz as to negligent
12 dental services rendered by him on behalf of Plaintiff Stephen Mitchell through and after June
13 17, 2006, toll the three year statute for commencement of the instant action?

14 **III.**

15 **Memorandum of Points and Authorities**

16 **Legal Argument**

17 In the case before this court Plaintiff Stephen Mitchell immediately attempted to bring
18 the alleged wrong doing to the attention of Defendant Dr. Harold Nemetz by contacting his
19 office personally on several occasions.

20 This action was followed up by letters to Defendant Nemetz which fell on deaf ears.
21 Plaintiff sought the services of two (2) different dentist offices to verify his complaints which
22 said dental offices were unable to confirm his allegations.

23 On August 17, 2005 within the three (3) year period since the alleged wrong doing
24 occurred, Plaintiff sought the assistance of the Dental Board of California to investigate this
25 matter. Their investigation was not completed until on or about June 27, 2006, which produced a
26 finding that Defendant Harold Nemetz had in fact extracted a non-defective tooth and left the
27 cracked tooth in place.

28

1 At no time prior to June 27, 2006 had Plaintiff any facts which supported his claim that
2 the wrong tooth had been extracted. The continuing conduct of Defendant Dr. Harold Nemetz in
3 concealing his negligent action through the entire investigation process tolled the time for filing
4 of said action to June 27, 2009.

5 California Code of Civil Procedure § 340.5 provides in part as follows:

6 “In an action for injury or death against a health care provider based upon such person's
7 alleged professional negligence, the time for the commencement of action shall be three
8 years after the date of injury or one year after the plaintiff discovers, or through the use of
9 reasonable diligence should have discovered, the injury, whichever occurs first. In no event
10 shall the time for commencement of legal action exceed three years unless tolled for any of
11 the following: (1) upon proof of fraud, (2) intentional concealment, or (3) the presence of a
12 foreign body, which has no therapeutic or diagnostic purpose or effect, in the person of the
13 injured person....”

14 For the purposes of this section:

15 (1) "Health care provider" means any person licensed or certified pursuant to
16 Division 2 (commencing with Section 500) of the Business and Professions Code, or licensed
17 pursuant to the Osteopathic Initiative Act, or the Chiropractic Initiative Act, or licensed pursuant
18 to Chapter 2.5 (commencing with Section 1440) of Division 2 of the Health and Safety Code;
19 and any clinic, health dispensary, or health facility, licensed pursuant to Division 2
20 (commencing with Section 1200) of the Health and Safety Code. "Health care provider"
21 includes the legal representatives of a health care provider;

22 (2) "Professional negligence" means a negligent act or omission to act by a health
23 care provider in the rendering of professional services, which act or omission is the proximate
24 cause of a personal injury or wrongful death, provided that such services are within the scope of
25 services for which the provider is licensed and which are not within any restriction imposed by
26 the licensing agency or licensed hospital.

27 The purpose of the statute requiring presentation of claims against a governmental
28 entity (Gov C § 911.2) is to give the entity notice and an opportunity to investigate and settle
meritorious claims without litigation. The purpose of former Gov. Code § 912 (see now Gov C
946.6) was to relieve persons who were under a disability or excusably neglectful from strict

1 compliance with the notice requirement. Viles v. State (1967) 66 C2d, P2nd 818, 1967 Cal Lexis
2 279.

3 The legislative intent in the provisions relating to filing of late claims against public
4 entities (Gov C §§ 911.6, 946.6 sub c) was to alleviate the harshness of strict compliance with
5 the claims presentation period for minors, disabled persons, and persons excusable neglectful.
6 Segal v. Southern Cal. Rapid Transit Dist. (1970) 12 CA 3d 509.

7 The Statute of Limitations under the FTCA is clear and provides:

8 A tort claim against the United States shall be forever barred unless it is presented in
9 writing to the appropriate Federal agency within two years after such claim accrues or
10 unless action is begun within six months after the date of mailing by certified or
11 registered mail, of the notice of the final denial of the claim by the agency to which it was
12 presented.

13 28 U.S.C. § 2401 (b).

14 In the instant case, the cause of action did not accrue until June 27, 2006. Plaintiff filed
15 his action on October 4, 2007, within the two year statutory period.

16 III.

17 Conclusion

18 Plaintiff respectfully requests that Defendant's Motion to Dismiss be denied.

19 Dated: February 12, 2008



20 FERMAN W. SIMS,

PROOF OF SERVICE

I, **JEAN F. KOLL** hereby declare that I am over the age of eighteen (18) years, and not a party to this action. My business address is 519 "H" Street; Crescent City, CA 95531.

On 11-13-2007 I served a true copy of the following document(s) in the manner described below:

Opposition to Motion to Dismiss

[x] **BY MAIL:** I am readily familiar with the practice of this business for collection and processing of documents for mailing with the United States Postal Service. Documents so collected and processed are placed in collection and deposited with the United States Postal Service that same day in the ordinary course of business. The above-referenced document(s) were placed in (a) sealed envelope(s) was (were) placed for collection and deposit with the United States Postal Service on the date listed below at Crescent City, California.

PERSONAL SERVICE: By personally delivering a true copy thereof to the person and at the address set forth below:

10 **FACSIMILE:** By faxing to the person(s) and fax number set forth below:

11 **ELECTRONIC FILING:** The above and foregoing document(s) were electronically
12 filed with the Clerk of the Court using the CM/ECF system, which sent notification of such filing
to the following:

12 | Melissa K. Brown

13 | United States Attorney

Chief, Civil Division

14 450 Golden Gate Avenue, Box 36055

15 San Francisco, Ca. 94102

Email: Melissa.k.brown@usdoj.gov

16 | BRUNNEN 1998

Office of the Attorney General

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22 | United States Attorney General

23 Department of Justice

23 | Attention: Michael B. Mukasey

24 950 Pennsylvania Avenue, NW

Washington DC 20530-0001

25 Executed on 11-13-07 at Crescent City, California. I certify and declare under penalty of perjury
26 under the laws of the State of California that the foregoing is true and correct. 

Jean F. Koll
JEAN F. KOLL